

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A23-0170**

State of Minnesota,
Respondent,

vs.

Christopher W. Haakenstad,
Appellant.

**Filed September 11, 2023
Affirmed
Ross, Judge**

Hennepin County District Court
File No. 27-CR-21-10945

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Mary F. Moriarty, Hennepin County Attorney, Kelly O'Neill Moller, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara J. Euteneuer, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Worke, Judge; and Cleary, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

ROSS, Judge

Christopher Haakenstad pleaded guilty to controlled-substance possession but challenged the calculation of his criminal-history score before sentencing. The district court denied his challenge and sentenced him to 25 months in prison based on a criminal-history score of eight points. Haakenstad appeals his sentence, arguing that the district court miscalculated his criminal-history score by errantly including four of his prior convictions. None of Haakenstad's challenges persuades us to disturb his sentence. We therefore affirm.

FACTS

Appellant Christopher Haakenstad pleaded guilty to fifth-degree possession of a controlled substance after police executed a search warrant at his home in June 2021 and found that he possessed methamphetamine. The plea agreement did not include his sentence. The presentence report calculated Haakenstad's criminal history to result in a criminal-history score of eight points, including in relevant part: a half-point for a 1997 Wisconsin forgery conviction; one-and-a-half points for a 2014 Hennepin County second-degree controlled-substance possession offense; and one-and-a-half points each for two 2013 Wisconsin felony convictions for controlled-substance possession with intent to sell and for controlled-substance manufacture or delivery. Haakenstad asked the district court to recalculate the score, to depart from the presumptive sentence, and to allow him to withdraw his plea. The district court denied all of Haakenstad's requests and sentenced him to the presumptive executed sentence under the sentencing guidelines of 25 months in prison based on a criminal-history score of eight points. Haakenstad appeals.

DECISION

Haakenstad challenges his sentence, focusing on his criminal-history score. He maintains that his score should have been four-and-a-half points rather than eight. He argues first that one of his prior Wisconsin felonies decayed and should not have been included; second, that his Hennepin County second-degree controlled-substance conviction should have been treated as a fifth-degree offense; and third that two of his Wisconsin felonies were part of the same behavioral incident and also should have been treated as the equivalent of lower-degree Minnesota offenses. He raises additional arguments in a supplemental brief. We address each argument.

I

Haakenstad first argues that his 1997 Wisconsin forgery conviction had decayed and should not have contributed a half-point to his criminal-history score. We review the district court's criminal-history-score determinations for an abuse of discretion, *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *rev. denied* (Minn. Aug. 20, 2002), and we interpret the Minnesota Sentencing Guidelines *de novo*. *State v. Strobel*, 932 N.W.2d 303, 306 (Minn. 2019). We review challenged factual findings for clear error. *See State v. Andersen*, 784 N.W.2d 320, 334 (Minn. 2010). Our review of the record leaves us uncertain about the key circumstances related to Haakenstad's Wisconsin forgery conviction. But we need not resolve our uncertainty because Haakenstad's presumptive sentencing range would have been the same with or without the forgery conviction.

Haakenstad was convicted of uttering a forged writing in 1997 and sentenced to probation, but he argues that the conviction should not have been included in his criminal-

history score. The guidelines explain when a conviction has decayed and should therefore be excluded:

In computing the criminal history score, a prior felony sentence or stay of imposition following a felony conviction must not be used if all the following, to the extent applicable, occurred before the date of the current offense:

(1) the prior felony sentence or stay of imposition expired or was discharged;

(2) a period of fifteen years elapsed after the date of the initial sentence following the prior conviction; and

(3) if the prior felony sentence was executed, a period of fifteen years elapsed after the date of expiration of the sentence.

Minn. Sent'g Guidelines 2.B.1.c (2020). It seems that the parties and district court understood the guideline to mean that 15 years must pass between probation expiring and the current offense occurring for the first requirement to be met. This is not so. The first element requires only that the stay or sentence for the prior felony must have been discharged or have expired *before the date of the current offense*, which, in this case, was in June 2021. Haakenstad was discharged from probation for the forgery conviction in 2009, so the conviction meets the first requirement. We are not otherwise persuaded by the state's reliance on our opinion in *Henderson-Bey v. State*, No. A21-0572, 2022 WL 17127, at *2 (Minn. App. Jan. 3, 2022), *rev. denied* (Minn. Mar. 29, 2022), to insist that 15 years must have passed. The *Henderson-Bey* opinion does not control here because it is nonprecedential and because it interprets a prior, inapplicable version of the guidelines. *See* 2022 WL 17127, at *2. The first element is met.

Neither party offers any argument on appeal as to the second or third elements, so we turn to the remaining elements. It is clear to us that the second element is met because

Haakenstad was sentenced in 1997, over 15 years before the current offense date. But the record does not adequately inform us as to whether the third element is met. The district court appeared to assume that the sentence was never executed, reasoning at the sentencing hearing, “I do not accept the argument that *if Mr. Haakenstad would have executed the sentence*, it then would have expired a long time ago” (Emphasis added.) But the record suggests that Haakenstad’s sentence may in fact have been executed. One of the exhibits to the state’s sentencing memorandum (Exhibit 2) implies that Haakenstad’s probation for the forgery offense was revoked in November 1998, about one year after he was first sentenced. And the presentence investigation indicates that, although Haakenstad’s parole expired in 2009, his parole was revoked and he was in and out of incarceration before 2009. The district court found only that Haakenstad’s probation expired in 2009. Neither party challenges the finding or attempts to interpret the record to clearly determine whether the sentence was executed. We cannot be certain whether the third decay element is met here.

We decline to remand for the district court to resolve the question, however, because the outcome would be the same regardless of the answer. Although we have said that “a sentence based on an incorrect criminal history score is an unauthorized sentence,” we made that comment and remanded for resentencing under circumstances that differ materially from those we face here. *State v. Provost*, 901 N.W.2d 199, 202 (Minn. App. 2017). In *Provost*, we held that remand was required because the error in the defendant’s criminal-history score placed him in a different guidelines range than would have applied without the error. *Id.* Despite the fact that his sentence still fell within the lower, correct

guidelines range, we remanded for resentencing, recognizing, “[B]ecause the sentencing guidelines serve as the anchor for a district court’s discretion at sentencing, when a [g]uidelines range moves up or down, offenders’ sentences tend to move with it.” *Id.* (quotation omitted). We reached that conclusion by adopting the Supreme Court’s reasoning that “[w]hen a defendant is sentenced under an incorrect [g]uidelines range—whether or not the defendant’s ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error.” *Id.* (quoting *Molina-Martinez v. United States*, 578 U.S. 189, 198 (2016)). Here the sentencing guidelines designate the same presumptive sentencing range for any criminal-history score greater than six points in a drug-offense conviction. Minn. Sent’g Guidelines 4.C (2020). And when the district court rejected Haakenstad’s sentencing arguments and sentenced Haakenstad, the prosecutor had just clarified that the same range would apply regardless of how the district court decided the motions:

Prosecutor: Also, Your Honor, even if the Court were to completely eliminate that conviction, he’d still be at 6.5 points. So, it makes no difference, he’d still be presumptive commit. So, I’d ask that the Court deny the motion.

Court: I am going to deny those alternative motions just made by Mr. Haakenstad. So, we will go forward today.

Because, for the reasons that follow, we decline to reduce Haakenstad’s criminal-history score based on his other arguments, and because the half-point reduction that might result on a remand would not reduce Haakenstad’s score below six points, the presumptive sentencing range the district court applied was accurate regardless of whether the conviction is counted.

II

Haakenstad next argues that the district court erred by assigning one-and-a-half points to a 2014 Hennepin County second-degree controlled-substance offense, sentenced in June 2016. Haakenstad argues that the crime equates today to a fifth-degree controlled-substance offense. Haakenstad bases his argument on the 2016 Drug Sentencing Reform Act (DSRA), which increased the drug-possession thresholds required for first-, second-, and third-degree possession for crimes committed on or after August 1, 2016. *See* 2016 Minn. Laws ch. 160, §§ 3–5, at 577–85 (codified at Minn. Stat. §§ 152.021–.023 (2016)). He contends that, under the new offense definitions, his second-degree controlled-substance offense would have been a fifth-degree offense and that the guidelines required the district court to treat it as a fifth-degree offense when sentencing him.

Haakenstad’s contention is unconvincing. He premises the argument mainly on the supreme court’s holding that, in the context of whether to classify a prior offense as a petty misdemeanor, misdemeanor, gross misdemeanor, or felony after enactment of the DSRA, district courts should apply the present-offense classification rather than the pre-DSRA classification. *See State v. Scovel*, 916 N.W.2d 550, 554, 558 (Minn. 2018); *see also Strobel*, 932 N.W.2d at 309–10. In *Strobel*, for example, the supreme court held that a fifth-degree felony offense was reclassified as a misdemeanor after the DSRA was passed and should have therefore been treated as a misdemeanor when the defendant committed his current offense for sentencing purposes. 932 N.W.2d at 307, 309. But Haakenstad’s argument does not raise an offense-classification issue but an offense-definition issue.

Section 2.B.7.a expressly addresses only how to classify an offense, not how to define it. Minn. Sent’g Guidelines 2.B.7.a (2020). Section 2.B.7.a does not control our analysis.

Haakenstad similarly argues that, if his conviction had been from out of state, then it would be treated as a fifth-degree offense, relying on *State v. Johnson*, 411 N.W.2d 267 (Minn. App. 1987). We concluded in *Johnson* that, based on the sentencing guideline directing district courts how to treat out-of-state offenses, a Wisconsin felony was not a crime in Minnesota. *Johnson*, 411 N.W.2d at 270. But Haakenstad’s reliance on *Johnson* is misplaced because the guideline analyzed in *Johnson* applies only to out-of-state offenses, and Haakenstad’s second-degree drug conviction is a Minnesota conviction. *See id.* at 268–69; Minn. Sent’g Guidelines 2.B.5 (2020). (“Convictions from Jurisdictions other than Minnesota.”). The district court did not abuse its discretion by not applying section 2.B.5 to an in-state conviction.

We believe that section 2.B.1 applies to the weight assigned to a prior Minnesota offense. This section instructs that “[t]he severity level ranking in effect at the time the current offense was committed determines the weight assigned to the prior offense.” Minn. Sent’g Guidelines 2.B.1 (2020). The severity level ranking in effect at the time of the offense for a second-degree controlled-substance possession offense was D7, which corresponds to one-and-a-half criminal-history points. Minn. Sent’g Guidelines 4.C, 2.B.1.a (2020). We hold that the district court did not abuse its discretion in assigning Haakenstad those points.

III

Haakenstad argues that the district court inappropriately included both of his 2013 Wisconsin convictions when it should have counted only one. He was convicted of both amphetamine possession with intent to sell and amphetamine manufacture or delivery. The district court applied each conviction to add one-and-a-half points to his criminal-history score. Haakenstad argues that both arose from a single course of conduct and that, therefore, only one should have counted toward his criminal-history score. He alternatively challenges the severity ascribed to the offenses under Minnesota’s equivalent statutory scheme.

We reject Haakenstad’s argument that the district court abused its discretion by including both 2013 Wisconsin convictions because they “appear to arise from a single incident.” *See* Minn. Sent’g Guidelines cmt. 2.B.107 (2020) (“In cases of multiple offenses occurring in a single course of conduct in which state law prohibits the offender from being sentenced on more than one offense, only the offense at the highest severity level should be considered.”). Haakenstad observes that the Wisconsin cases were consolidated and that the Wisconsin court records list the same date for each offense: November 18, 2010. But the state argued at sentencing that the delivery offense occurred on December 14, 2011, relying on evidence of the Wisconsin case file to show that the offenses occurred in different counties and were consolidated for prosecution. The state maintained that the possession-with-intent offense occurred in St. Croix County and the delivery offense in Barron County. It argued that the presentence investigation incorrectly showed the Barron County case—with its listed December 14, 2011 offense date—as dismissed when it had

in fact been consolidated with the St. Croix County case. The district court was persuaded by the state’s argument in finding that the offenses occurred on different dates. We review the finding only for clear error, *see Andersen*, 784 N.W.2d at 334, and the record does not convince us that the finding is clearly erroneous. The district court did not abuse its discretion in treating the offenses as separate courses of conduct.

Haakenstad argues alternatively that these Wisconsin convictions, which were both treated as equivalent to third-degree Minnesota controlled-substance sale offenses, should have been weighted as fifth- or fourth-degree offenses. The district court determines “whether and how a prior non-Minnesota conviction should be counted in the criminal history score,” in part by finding “the equivalent Minnesota offense based on the elements of the prior non-Minnesota offense.” Minn. Sent’g Guidelines 2.B.5.a–b (2020). The district court did so correctly here.

Haakenstad was convicted of possession of amphetamines with intent to sell under Wisconsin Statutes section 961.41(1m) (2010), which results in a Class F felony when a person who “possess[es], with intent to manufacture, distribute or deliver, a controlled substance or a controlled substance analog” possesses three grams or less of the prohibited substance, § 961.41(1m)(e)(1). Haakenstad argues that this possession-with-intent offense equates to a fifth-degree possession offense in Minnesota because fifth-degree possession includes possession of less than three grams of a schedule II substance. But the argument overlooks the point that Haakenstad’s conviction fits under Minnesota’s definition of a sale offense, not merely a possession offense. *See* Minn. Stat. § 152.01, subd. 15a (2020)

(including possession with intent to sell in the definition of “sell”). The fifth-degree possession offense does not fit.

Haakenstad argues that if the possession-with-intent offense is not a fifth-degree offense, it should be a fourth-degree offense because methamphetamine—the subject of his convictions—is defined both as a narcotic and a schedule II controlled substance in Minnesota. *See* Minn. Stat. §§ 152.02, subd. 3(d)(2) (defining methamphetamine as a schedule II controlled substance), .01, subd. 10(1) (2020) (defining methamphetamine as a narcotic drug). He argues that Wisconsin law does not make this distinction. A person is guilty of fourth-degree controlled-substance possession in Minnesota if “the person unlawfully possesses one or more mixtures containing a controlled substance classified in Schedule I, II, or III . . . with the intent to sell it.” Minn. Stat. § 152.024, subd. 2(2) (2020). If he sells a schedule II substance, he is guilty of a fourth-degree sale offense. *Id.*, subd. 1 (2020). A person is guilty of third-degree controlled-substance sale if “the person unlawfully sells one or more mixtures containing a narcotic drug.” Minn. Stat. § 152.023, subd. 1(1) (2020). Haakenstad’s methamphetamine-based convictions therefore appears to fit under each of these definitions, and Haakenstad maintains that the fourth-degree possession definition should govern because it most closely describes his behavior.

We hold that the district court did not abuse its discretion by equating the Wisconsin offense with a Minnesota third-degree sale offense. When two statutes both govern the same behavior, the more specific statute controls. *See* Minn. Stat. § 645.26, subd. 1 (2022); *State v. Kalvig*, 209 N.W.2d 678, 681 (Minn. 1973). And we have held that third-degree sale, referring to a narcotic, is more specific than fourth-degree sale, referring to a schedule

II controlled substance. *State v. Richmond*, 730 N.W.2d 62, 70 (Minn. App. 2007), *rev. denied* (Minn. June 19, 2007). The third-degree sale statute therefore applies and the district court did not abuse its discretion by treating Haakenstad's possession-with-intent conviction as a Minnesota third-degree sale offense under the applicable Minnesota statute.

Haakenstad also challenges the district court's decision that his Wisconsin delivery offense equates with a third-degree Minnesota controlled-substance sale offense. This conviction was for violating Wisconsin Statutes section 961.41(1) (2010), which prohibits a person from "manufactur[ing], distribut[ing] or deliver[ing] a controlled substance or controlled substance analog" and that a person is guilty of a Class E felony if he manufactures, distributes, or delivers "more than 3 grams but not more than 10 grams" of the prohibited substance, § 961.41(1)(e)(2). Haakenstad's conviction should not be weighted as a fifth-degree possession offense, as he urges, because it was a sale offense, not a possession offense. His argument that Minnesota Statutes section 152.024, subdivision 2(2) applies is also not persuasive for the same reason; the statute defines fourth-degree possession with intent to sell, which is not the behavior Haakenstad was convicted of under section 961.41(1)(e)2. The district court did not abuse its discretion in weighting this offense as a sale offense.

IV

Haakenstad offers additional arguments in a supplemental brief. He mainly contends that his 2014 Hennepin County second-degree controlled-substance offense should be excluded from his criminal-history score because his sentence for that offense rests illegally on an incorrect score. His concern is that one of his Wisconsin offenses was

misclassified as a felony rather than a gross misdemeanor in sentencing his 2014 offense, which improperly increased his criminal-history score. Haakenstad does not identify any record evidence establishing that his prior sentence was illegal, offering the unsupported assertion that “the [supporting] evidence in the record has mysteriously disappeared.” We will not consider his proffered supplemental documents, which are outside our record. *See Plowman v. Copeland, Buhl & Co.*, 261 N.W.2d 581, 583 (Minn. 1977) (“It is well settled that an appellate court may not base its decision on matters outside the record on appeal, and that matters not produced and received in evidence below may not be considered.”). Having no basis to conclude that the district court abused its discretion by including Haakenstad’s 2014 Hennepin County offense, we decline to reverse.

Haakenstad also argues that criminal-complaint records are not enough to prove a prior conviction against him, apparently referring to each of his Wisconsin convictions. But the record contains evidence of the convictions, not just the complaints. His other contentions do not warrant further discussion.

Affirmed.